

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

UNITED STATES of AMERICA,

Plaintiff,

V.

VLADISLAV BAYDOVSKIY, CAMIE BYRON, VIKTOR KOBZAR, ALLA SOBOL a/k/a ALLA PYATETKSAY, and DAVID SOBOL,

## Defendants.

Case No. CR09-0084 MJP

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

This matter comes before the Court on the government's memorandum regarding restitution. (Dkt. No. 259.) At the request of the parties, the Court held an evidentiary hearing on April 9 and 12, 2010 on the issue of restitution. (Dkt. Nos. 297, 298.) In addition to the testimony and argument presented at the hearing, the Court has considered the parties' memoranda submitted in advance of the restitution hearing and declarations submitted in support thereof. (Dkt. Nos. 256, 260, 276, 278, 279, 280, 281, 284, 286, 287, 294.) Before setting forth its findings of fact and conclusions of law, the Court summarizes the procedural history of this matter.

## Procedural History

2 On March 25, 2009, the grand jury returned an indictment charging Defendants Vladislav  
3 Baydovskiy, Donata Baydovskiy, Camie Byron, Viktor Kobzar, Alla Sobol, David Sobol, and  
4 Sandra Thorpe with conspiracy to commit bank, mail and wire fraud and bank, mail, and wire  
5 fraud for transactions arising out of a purported mortgage fraud scheme. (Dkt. No. 1.) On July  
6 16, 2009, the grand jury returned a superseding indictment. (Dkt. No. 137.) Over the course of  
7 the next months, the government filed superseding informations and all Defendants entered pleas  
8 of guilty. (See Dkt. Nos. 113, 122, 131, 146, 174, 181, 182.) Defendant Donata Baydovskiy did  
9 not plead guilty to a claim involving conspiracy or a scheme and the Court determined restitution  
10 as to her separately. (See Dkt. No. 264.) The Court also issued a separate order of restitution as  
11 to Defendant Sandra Thorpe. (See Dkt. No. 215.) The Court granted the government's request  
12 to conduct a consolidated restitution hearing. (Dkt. No. 201.)

13 For the purposes of determining the applicable offense level under the Sentencing  
14 Guidelines, Defendants Camie Byron, David Sobol, Alla Sobol, Vladimir Baydovskiy, and  
15 Viktor Kobzar stipulated the loss amount was between \$2.5 million and \$7.0 million. In its  
16 sentencing memoranda regarding these Defendants, the government used identical language to  
17 describe the loss amount stipulation:

18 The stipulation specifically provides that it shall not apply to the judicial  
19 determination of restitution in this case. The parties are free to advocate for any  
20 amount of restitution, wholly independent of the stipulated loss range. In  
21 addition, evidentiary submissions offered to substantiate the agreed loss estimate for  
guidelines purposes are not to be cited to the court for purposes of challenging  
any proffered claim for restitution.

22 (See, e.g., Dkt. No. 249 at 9 n.2.) The parties requested an evidentiary hearing to determine the  
23 amount of restitution. On January 26, 2010, just a few days before the originally scheduled date  
24 for the restitution hearing, the Court and Defendants received the Declaration of James Vach,  
25 which attached voluminous documentation of the purported loss amounts organized by lender.  
26 (Dkt. No. 255.) Because Defendants did not have the time to analyze the government's

1 submission in advance of the February 1, 2010 hearing, the Court continued the hearing and set a  
2 briefing schedule for the parties. (Dkt. No. 265.) At the rescheduled evidentiary hearing, the  
3 Court heard testimony from James Vach, a consumer fraud analyst with the U.S. Postal  
4 Inspection Service, and argument from counsel.

5 **Findings of Fact**

6 1. Defendants Vladislav Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and David  
7 Sobol entered into plea agreements with the United States in which they agreed to "make  
8 restitution in an amount to be determined at the time of sentencing or in a separate restitution  
9 hearing to be conducted consistent with Title 18, United States Code, Sections 3663A and 3664."  
10 (Dkt. Nos. 119 (A. Sobol), 126 (D. Sobol), 150 (Byron), 186 (V. Baydovskiy), 192 (Kobzar).)

11 2. Defendants Vladislav Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and David  
12 Sobol entered into plea agreements with the United States in which each agreed to plead guilty to  
13 a Superseding Information charging each defendant with conspiracy to commit bank fraud, mail  
14 fraud, and wire fraud, in violation of 18 U.S.C. § 371. (Dkt. Nos. 119 (A. Sobol), 126 (D.  
15 Sobol), 150 (Byron), 186 (V. Baydovskiy), 192 (Kobzar).)

16 3. The language in each Superseding Information alleges a conspiracy to defraud financial  
17 institutions by among other things: (a) locating residential real properties that were available for  
18 purchase and recruiting straw buyers or otherwise unqualified buyers to participate in purchasing  
19 the properties; (b) falsely inflating the value of the properties, (c) submitting false and fraudulent  
20 mortgage loan applications, title documentation, and related documents to financial institutions,  
21 thereby causing lenders to make loans; (d) creating false and fraudulent documents intended to  
22 conceal the diversion of loan proceeds to the Defendant and her co-conspirators; and (e)  
23 diverting fraud proceeds for their personal use and benefit, and to further the fraud scheme. The  
24 term of the agreement to defraud was alleged to begin no later than September 15, 2005 and  
25 continue until on or about December 31, 2008. (Dkt. Nos. 113 (A. Sobol), 122 (D. Sobol), 146  
26 (Byron), 181 (V. Baydovskiy), 182 (Kobzar).)

1 4. Defendants Vladislav Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and David  
 2 Sobol all agreed in the factual statement of their respective plea agreements that they were  
 3 “guilty of the charged offense.” (Dkt. Nos. 119 (A. Sobol), 126 (D. Sobol), 150 (Byron), 186 (V.  
 4 Baydovskiy), 192 (Kobzar).) The language of the charged offense, to which the defendants  
 5 agreed, states that “[d]uring the period of the conspiracy, the Defendant and her co-conspirators  
 6 secured through straw buyers real estate purchase and re-finance loans, representing millions in  
 7 loan proceeds, based on false and fraudulent representations. (Dkt. Nos. 113 (A. Sobol), 122 (D.  
 8 Sobol), 146 (Byron), 181 (V. Baydovskiy), 182 (Kobzar).)

9 5. The plea agreements identify the following properties and transactions as “representative  
 10 examples of overt acts” committed by the co-conspirators:

11 A. 2632 78th Avenue NE, Medina, WA (Dkt. No. 186-2 at 9; Dkt. No. 192 at 9.)  
 12 B. 5571 Lakemont Blvd. SE Apt 1404, Bellevue, WA (Dkt. No. 150 at 9)  
 13 C. 5579 152nd Place SE, Bellevue, WA (Dkt. No. 126 at 9; Dkt. No. 119 at 9.)

14 6. For the three properties listed in the plea agreements, Defendants fraudulent conduct  
 15 caused losses as follows:

16 **LOSS TABLE**

<u>Property</u>	<u>Victim</u>	<u>Description of Loss</u>	<u>Documentation</u>	<u>Amount</u>
5579 152nd Place SE, Bellevue, WA	Aurora Loan Services (Homecomings Financial)	REO Sale	Elliot Decl. ¶ 5 (Attached to Vach Decl.)	\$468,946.11
5571 Lakemont Blvd. SE Apt 1404, Bellevue, WA	J.P. Morgan Chase (Bear Sterns Residential Mortgage Corp.)	Short Sale of 2 Loans	Simmons Decl. ¶ 4 (Attached to Vach Decl.)	\$180,049.59
2632 78th Avenue NE,	FDIC (Taylor Bean &	Pending Foreclosure	Flynn Decl. ¶ 4 (Vach Decl.)	\$1,487,424.36.

1	Medina, WA	Whitaker)			
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3 7. For the remaining victims listed in Exhibit C to the Vach Declaration, the government  
4 has failed to demonstrate, by a preponderance of the evidence, that the alleged victims suffered  
5 loss caused by Defendants' conduct.

6 **Analysis**

7 Under the Mandatory Victims Restitution Act, defendants who commit crimes of "fraud  
8 or deceit" are required to pay restitution. 18 U.S.C. § 3663A(c)(1)(A)(ii). The statute defines  
9 "victim" as "a person directly and proximately harmed as a result of the commission of an  
10 offense for which restitution may be ordered ...." 18 U.S.C. § 3663A(a)(2). The government  
11 bears the burden "of establishing by a preponderance of the evidence that the victim's damages  
12 were caused by the conduct of which the defendant was convicted." United States v. Peterson,  
13 538 F.3d 1064, 1074-75 (9th Cir. 2008) (quoting United States v. Rice, 38 F.2d 1536, 1540 (9th  
14 Cir. 1994)); see also United States v. Andrews, 600 F.3d 1167, 1171 (9th Cir. 2010)  
15 (government bears the burden of proving both (1) person is a victim for the purposes of  
16 restitution and (2) the amount of the loss).

17 When analyzing restitution in the context of a conspiracy, "the restitution order may  
18 include acts of related conduct for which the defendant was not convicted." United States v.  
19 Brock-Davis, 504 F.3d 991, 999 (9th Cir. 2007) (quotations and citations omitted); see also  
20 United States v. Bright, 353 F.3d 1114, 1120 (9th Cir. 2004) (affirming restitution order based on  
21 conduct for dismissed counts). The inclusion of related conduct in the Court's analysis does not,  
22 however, alleviate the government of its burden. As the Ninth Circuit recently reiterated in  
23 Peterson, "[r]estitution may compensate victims only for actual losses caused by the defendant's  
24 criminal conduct." 538 F.3d at 1075 (quotation omitted) (emphasis added). The Peterson court  
25 quoted an earlier opinion in United States v. Gamma Tech Indus., Inc., 265 F.3 917 (9th Cir.  
26 2001):

1 Defendant's conduct need not be the sole cause of the loss, but any subsequent  
 2 actions that contribute to the loss, such as an intervening cause, must be directed  
 3 related to the defendant's conduct. The causal chain may not extend so far, in  
 4 terms of the facts or time span, as to become unreasonable.

5 265 F.3d at 928. The Peterson court relied on testimony at trial demonstrating defendants sold  
 6 43 properties using false gift letters to HUD. Id. The Peterson court cited favorably United  
 7 States v. Spicer, 57 F.3d 1152, 1154 (D.C. Cir. 1995), where the D.C. Circuit affirmed a  
 8 restitution order based on a defendant's factual stipulation that he made misrepresentations on a  
 9 total of 81 mortgage applications. See Peterson, 538 F.3d at 1076.

10 Unlike the scenarios in Peterson or Spicer, the Court here does not have a trial record or  
 11 factual stipulations from which it can make findings as to restitution. At the evidentiary hearing,  
 12 the government did not admit the "fraud book" that formed the basis of its Indictment. Indeed,  
 13 the government agreed to proceed without the fraud book before the Court could rule on  
 14 Defendants' objection to the presentation of the fraud book:

15 Government (Mr. Oesterle): Focusing on the loans that are the subject – one  
 16 subject of today's proceeding, how was it that the government identified the  
 17 initial set of loans what were categorized as being potentially fraudulent?

18 Mr. Vach: Well, I know that the FBI had begun the investigation. Our agency  
 19 became involved somewhat after that. We were told that they believed that there  
 20 was several entities involved in the fraud, in a mortgage fraud. We began to – we  
 21 took the names of those people that we had, ran them through data bases, looked  
 22 for properties in their names, and then also looked for names of people that they  
 23 sold those properties to, and then we ran those names through data bases to see  
 24 what properties they had, and then began to subpoena bank records and mortgage  
 25 file records.

26 Government: And what was the result of the efforts? Was there a document  
 27 prepared by yourself or the others?

28 Mr. Vach: Yes, we produced a document that we call the fraud book.

29 Government: And what information is included in the fraud book?

30 Mr. Vach: It usually gives an address, a sale date, the seller and the buyer, what  
 31 the status – we have a column as far as whether the investigation was still pending  
 32 ... the mortgage file, the amount of the mortgage, the mortgage lender, the loan  
 33 number, the escrow agent, the escrow company, which was Emerald City. That's  
 34 what we were focused on. The loan broker, the loan application date, the name of  
 35 the employer, the monthly salary. If there was a 1040 or W-2 included,  
 36 information regarding verification of deposit and employment, and then a notes  
 37 column for clarification of some of those other items.

1 Government: Were the loans – were all of the loans listed on the fraud book  
2 determined to include fraud of one sort or another in their preparation or  
3 submittal?

4 Mr. Grant: Object to the question.

5 Mr. Offenbecher: I am going to object to the item to the extent that the witness is  
6 going to testify about a document that has not been provided to the court. Can I  
7 voir dire the witness on that?

8 ...

9 Mr. Offenbecher: I object to him testifying about a document that at this point on  
10 the day of the hearing has not been provided to the court and the defense counsel  
11 had no notice that a fraud document was going to be a subject of his testimony  
12 here ...

13 The Court: Mr. Oesterle, any response?

14 Government: I can proceed without referencing the fraud book. It was a  
15 background document that actually was the source of a document that has been  
16 produced to the parties and the court. I can move on from here.

17 The Court: All right. Go ahead.

18 The government's next question relates the identification of loan losses, not the identification of  
19 fraud in the loan application materials. The importance of the fraud book became apparent in  
20 later questioning:

21 Government: And did you -- have you determined whether the application was  
22 accurate?

23 Mr. Vach: We determined that it was a fraudulent application.

24 Government: Based on what?

25 Mr. Vach: As I recall – well, let me – if I may – may I reference the fraud book?

26 Government: I believe there is an understanding that we're not to be referencing  
27 that. It has not been submitted to the Court.

28 Mr. Vach: I am trying to recall in that instance what the fraud was involving that  
29 particular loan. I believe it was income and employer.

30 Instead of the fraud book, the government submitted two summary exhibits which described  
31 various loss calculations for certain loans without an explanation of the fraud at issue in each  
32 loan. The first document, Exhibit A to the Vach Declaration, was created simply to identify the  
33 holder of the loans that originated from Defendants' companies.<sup>1</sup> (Vach Decl. ¶ 5, Ex. A

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1 (entitled "Losses from Lenders").) Mr. Vach created the second summary document, Exhibit C,  
2 upon receipt of loss documentation from the lenders. (Vach Decl. ¶ 10, Ex. C.) Neither  
3 document correlates the properties to any fraudulent loan documents. Instead, the exhibits to the  
4 Vach Declaration provide documentation of the loss amounts on the assumption that the losses  
5 were caused by Defendants' conduct. At an evidentiary hearing, the Court cannot make this  
6 assumption. Mr. Vach's testimony did not explain how Defendants' fraud caused the losses  
7 presented:

8 Q: ... Was there a determination made as to whether the loan that was secured to  
9 purchase this property was secured using fraudulent means?

10 A: Yes. All of the properties on this Exhibit C were deemed to be fraudulent  
11 loans.

12 Q: And who made that determination?

13 A: The investigative prosecution team.

14 Q: What is that determination based on?

15 A: Based on a review of the files and witness testimony, a review of seized  
16 materials, and on admissions by the defendants and proffers.

17 The government's description of its own review of the record, of course, does not create a record  
18 before this Court. The need to explain the nature of the fraud is particularly important in cases  
19 such as this one where Defendants processed loans that did not include fraudulent means  
20 alongside loans that did include fraud.

21 The government's closing argument also appeared to assume the Court had heard  
22 testimony regarding Defendants' use of fraudulent loan documents:

23 Mr. Oesterle: The defendants here created the false documentation. They  
24 obtained the loans using that documentation. They then closed on those loans  
25 using further false documentation. . . So, really, it's fine to talk about all those  
26 other things, but they don't change the most important fact, which is those loans  
were obtained by fraudulent means.

1 The Court did not hear testimony or receive documents demonstrating that, with respect to all the  
2 loans identified in the Vach Declaration, Defendants created the false documentation, that they  
3 obtained the loans using that documentation, or that they closed the loans using false  
4 documentation. The government failed to meet its burden of demonstrating, by a preponderance  
5 of the evidence, Defendants' criminal conduct caused the loss amounts set forth in Exhibit C to  
6 the Vach Declaration. In the absence of such a showing, the Court may only impose restitution  
7 for restitution for losses related to properties for which the Defendants admitted preparing  
8 fraudulent documents.

9  
10 The Court summarizes its calculation for each of those properties as follows:

11 2632 78th Avenue NE, Medina, WA

12 Though the loan (#1694519) was originally issued by Taylor Bean & Whitaker, the loan  
13 is now being held by the Federal Deposit Insurance Corporation ("FDIC") and the FDIC is thus  
14 the victim. The unpaid balance on the original \$2.4 million loan is \$1,721,378.33 and a tax  
15 assessment obtained by the FDIC values the property at \$471,000.00. (Vach Decl. at "FDIC"  
16 tab, Flynn Decl. ¶ 4.) The FDIC's estimated loss, based on the FDIC-R formula related to  
17 foreclosures is \$1,487,424.36. The FDIC is entitled to restitution in the amount of  
18 \$1,487,424.36.

19  
20 The government also submitted a request from Marina Bakhmet that sought attorneys'  
21 fees. (Vach Decl. at "Bakhmet, Marina" tab.) While attorneys' fees arising as a direct and  
22 foreseeable result of the Defendants' conduct are compensable, the documentation submitted  
23 must allow the court to show they were "necessarily incurred." United States v. Waknine, 543  
24 F.3d 546, 558-59 (9th Cir. 2008) (citations omitted). Here, Ms. Bakhmet's counsel's submission  
25  
26

1 does not describe in sufficient detail the work completed or why it was necessary to protect Ms.  
2 Bakhmet's interests. The Court declines to award Ms. Bakhmet these fees.

3 5571 Lakemont Blvd. SE Apt 1404, Bellevue, WA

4 Though the loans (# 16528747 and #16528598) were originally issued by Bear Sterns  
5 Residential Mortgage Corp., they are now being held by the J.P. Morgan Chase, which is the  
6 victim. The unpaid balance on loan #16528747 is \$106,000 and the unpaid balance on loan  
7 #16528598 is \$424,000. (Vach Decl. at "Chase" tab, Simmons Decl. ¶ 4.) The property was  
8 sold through a short-sale for \$430,000. The documents established Chase suffered \$180,049.59  
9 in loss as a result of Defendants' conduct. Chase is entitled to restitution for that amount.

10 5579 152nd Place SE, Bellevue, WA

11 Though the loan (#21941935) was originally issued by Homecomings Financial, the loan  
12 is now being held by Aurora Home Loan Services, which is now the victim. The total debt on  
13 the loan is \$1,173.922.04, including the unpaid balance, accrued interest, and advance balances.  
14 (Vach Decl. at "Aurora" tab, Elliott Decl. ¶ 5.) The property sold through an REO sale for  
15 \$704,975.93. Aurora is entitled to \$468,946.11 in restitution from Defendants.

16 **Conclusions of Law**

17 1. The Mandatory Victim Restitution Act applies in this case because defendants Vladislav  
18 Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and David Sobol entered guilty pleas to  
19 engaging in a conspiracy to commit bank fraud, mail fraud, and wire fraud.

20 2. The number of victims in this case is not so large as to make restitution impracticable and  
21 determining issues of fact related to the cause or amount of the victim's losses will not  
22 complicate or prolong the sentencing process to a degree that the need to provide restitution to  
23 any victim is outweighed by any burden on the sentencing process.

1 3. Defendants Vladislav Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and David  
2 Sobol shall make restitution to the victims identified in the Loss Table in the amounts entered in  
3 the Table.

4 4. While the Court finds that more than one defendant contributed to the losses incurred by  
5 the victims, defendants Vladislav Baydovskiy, Viktor Kobzar, Alla Sobol, Camie Byron and  
6 David Sobol shall each be jointly and severally liable for payment of the full amount of the  
7 restitution.

8 5. Defendants shall make monthly payments of no less than 10% of their household income  
9 as determined by the probation department.

10 **Further Proceedings**

11 The Court directs the parties to meet and confer to draft a proposed restitution order in  
12 accordance with the findings of fact and conclusions of law set forth above within 10 days of  
13 this Order.

14 Dated this 18th day of June, 2010.

15  
16   
17 Marsha J. Pechman  
18 United States District Judge